Supreme Court, U. S.
FILED
FEB 17 1977
MICHAEL [illegible] JR., CLERK

In The

Supreme Court of the United States

October Term, 1976

No. 76-1136

ROBERT J. HELSTOSKI,

Petitioner,

vs.

UNITED STATES OF AMERICA,

Respondent.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE THIRD CIRCUIT

Herald Price Fahringer, Esq.
Attorney for Petitioner
One Niagara Square
Buffalo, New York 14202
(716) 849-1333

Lipsitz, Green, Fahringer,
Roll, Schuller & James
of Counsel.

Daily Record Corporation
Rochester, New York

(2635)

Spaulding Law Printing
Syracuse, New York

TABLE OF CONTENTS

	Page
Opinion Below.	1
Jurisdiction.	2
Constitutional Provisions Involved.	2
Statutes Involved.	3
Questions Presented.	3
Statement of Facts.	4
The Rutherford Corporations.	4
The Results of Racioppi's Scheme.	5
The Indictment and Trial.	6
Reasons for Granting the Writ:	7
I. Errors of due process proportion were committed by the trial court in its refusal to turn over to the defense, in accordance with *Brady v. Maryland*, 373 U.S. 83 (1963), the affidavit of an unindicted co-conspirator which was believed to be favorable to the accused; and	
Its refusal to grant petitioner's application under *Giglio v. United States*, 405 U.S. 150 (1972), to interview government agents who spoke to the chief prosecution witness upon his denial under oath of certain things that had transpired in the witness' meetings with the government.	7
II. Petitioner's sixth amendment right to a fair and impartial trial was violated by requiring him to be tried in the Trenton division of the District of New Jersey.	12
III. The trial court's grievous error in permitting the government to call an unindicted co-conspirator as a	

Page

witness to extract from him a claim of self-incrimination denied petitioner due process of law..... 14

Conclusion..... 18

Appendix

A. Judgment Order of the United States Court of Appeals for the Third Circuit..... A-1

Table of Cases

Page

Beckwith v. United States, U.S. , 96 S.Ct. 1612 (1976)..... 17

Brady v. Maryland, 373 U.S. 83 (1963)..... 3, 7

Doyle v. Ohio, U.S. , 96 S.Ct. 2240 (1976)..... 17

Dupoint v. United States, 388 F.2d 39 (5th Cir. 1967).. 13

Garner v. United States, U.S. , 96 S.Ct. 1178 (1976) 17

Giglio v. United States, 405 U.S. 150 (1972).....3, 7, 10

Grunewald v. United States, 353 U.S. 391 (1957)..... 16

Jencks v. United States, 353 U.S. 657 (1957)..... 9

Miller v. Pate, 386 U.S. 1 (1967)..... 9

Napue v. Illinois, 360 U.S. 264 (1959)..... 9

San Fratello v. United States, 340 F.2d 560 (5th Cir. 1965)..... 16

United States v. Agurs, U.S. , 96 S.Ct. 2392 (1976). 9

United States v. Coppola, 479 F.2d 1153 (10th Cir. 1973)..... 16

United States v. Gurney, 393 F.Supp. 688 (M.D. Fla. 1974)..... 13

United States v. Mandujano, U.S. , 96 S.Ct. 1768 (1976)..... 17

United States v. Ritz, Docket No. 76-1715 (5th Cir.)..... 17

United States v. Roberts, 503 F.2d 598 (9th Cir. 1974), *cert. denied*, 419 U.S. 1113 (1975)..... 16

United States v. Tucker, 267 F.2d 212 (3d Cir. 1959)... 16

Weatherford v. Bursey, 528 F.2d 483 (4th Cir. 1975), *cert. granted*, 19 Crim. L. Rptr. 4085 (U.S. June 21, 1976)..... 8

Page

United States Constitution

Fifth Amendment 14, 15, 16, 17

Sixth Amendment 4, 12

Statutes

18 U.S.C. §371 ..... 11, 12

26 U.S.C. §7206(1) 2, 6, 11

28 U.S.C. §1254(1) 2

Federal Rules of Criminal Procedure

Rule 18 ..... 3, 12, 13

In The

Supreme Court of the United States

October Term, 1976

No.

ROBERT J. HELSTOSKI,

Petitioner,

vs.

UNITED STATES OF AMERICA,

Respondent.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE THIRD CIRCUIT

Petitioner, ROBERT J. HELSTOSKI, prays that a writ of certiorari issue to review the judgment of the United States Court of Appeals for the Third Circuit entered on January 18, 1977.

OPINION BELOW

The judgment order of the Court of Appeals dated January 18, 1977 is printed in Appendix A, *infra*, at p. A-1, *et seq.*

JURISDICTION

Following a jury trial, petitioner was found guilty in the United States District Court for the District of New Jersey of filing false personal and corporate income tax returns in violation of §7206(1) of Title 26 of the United States Code. On April 8, 1976 petitioner was sentenced to eighteen months in prison and fined a total of $10,000.

On January 18, 1977 the Court of Appeals for the Third Circuit affirmed petitioner's conviction.

This petition for a writ of certiorari is filed within thirty days following that affirmance. The jurisdiction of this Court is invoked under 28 U.S.C. §1254(1).

CONSTITUTIONAL PROVISIONS INVOLVED

AMENDMENT V

No person shall be held to answer for a capital, or otherwise infamous crime, unless on a presentment or indictment of a Grand Jury, except in cases arising in the land or naval forces, or in the Militia, when in actual service in time of War or public danger; nor shall any person be subject for the same offence to be twice put in jeopardy of life or limb; nor shall be compelled in any criminal case to be a witness against himself, nor be deprived of life, liberty, or property, without due process of law; nor shall private property be taken for public use, without just compensation.

AMENDMENT VI

In all criminal prosecutions, the accused shall enjoy the right to a speedy and public trial, by an impartial jury of the State and district wherein the crime shall have been committed, which district shall have been previously ascertained by law, and to be informed of the nature and cause of the accusation; to be confronted with the witnesses against him; to have compulsory process for obtaining witnesses in his favor, and to have the Assistance of Counsel for his defence.

STATUTES INVOLVED

§7206. Fraud and false statements.

Any person who —

(1) Declaration under penalties of perjury. — willfully makes and subscribes any return, statement, or other document, which contains or is verified by a written declaration that it is made under the penalties of perjury, and which he does not believe to be true and correct as to every material matter . . . .

* * *

shall be guilty of a felony and, upon conviction thereof, shall be fined not more than $5,000, or imprisoned not more than 3 years, or both, together with the costs of prosecution.

Federal Rules of Criminal Procedure

Rule 18

Place of Prosecution and Trial

Except as otherwise permitted by statute or by these rules, the prosecution shall be had in a district in which the offense was committed. The court shall fix the place of trial within the district with due regard to the convenience of the defendant and the witnesses.

QUESTIONS PRESENTED

1. Whether errors of due process proportion were committed by the trial court in its refusal to turn over to the defense, in accordance with *Brady v. Maryland*, 373 U.S. 83 (1963), the affidavit of an unindicted co-conspirator which was believed to be favorable to the accused; and its refusal to grant petitioner's application under *Giglio v. United States*, 405 U.S. 150 (1972), to interview government agents who spoke to the chief prosecution witness upon his denial under oath of certain things

that had transpired in the witness' meetings with the government.

2. Whether petitioner's sixth amendment right to a fair and impartial trial was violated by requiring him to be tried in the Trenton division of the District of New Jersey.

3. Whether the trial court's grievous error in permitting the government to call an unindicted co-conspirator as a witness to extract from him a claim of self-incrimination denied petitioner due process of law.

STATEMENT OF FACTS

The petitioner, Robert J. Helstoski, a well-respected Newark builder, was charged in a 23-count indictment with signing corporate income tax returns which overstated the deductions entitled to be claimed by the three corporations of which he was president, signing personal income tax returns which understated petitioner's adjusted gross income, and conspiring with Frank Racioppi and Michael Sadin to defraud the United States.

The Rutherford Corporations

In 1962, Frank Racioppi, a partner in a New Jersey lumber company, a land developer and a shrewd businessman, offered petitioner a partnership in his latest venture. Racioppi's plan was to build a 250-unit garden apartment complex in East Rutherford, New Jersey (a suburb of Newark). At Racioppi's suggestion, three corporations were formed to develop the property — Rutherford Park, Inc., Rutherford East, Inc., and Rutherford Heights, Inc.* While Racioppi, a former bookkeeper, was totally responsible for forming the three corporations and obtaining the necessary financing for the project, Robert Helstoski actually built the complex. Racioppi insisted

*Hereinafter referred to as the Rutherford Corporations.

that petitioner be president of the Rutherford Corporations. Petitioner was responsible for renting the apartments, maintenance, and related duties. For the sake of convenience, the corporate checkbooks were kept in petitioner's office from which he performed his miscellaneous management duties. Petitioner could not draw a check on the accounts of any of the corporations without obtaining the signature of either Frank Racioppi or Michael Sadin.

The Rutherford Management Company was a partnership formed to manage the garden apartments. Petitioner possessed one-half interest in the partnership while Racioppi and Sadin each had 25 per cent. The three corporations would pay the management company, which in turn compensated the three partners. When the corporations began making a profit, Racioppi told petitioner to draw checks to the order of various contractors. Racioppi then forged the payee's endorsement, cashed the checks at his bank, and distributed one-half of the proceeds to petitioner; Racioppi and Sadin shared the remainder.

The Results of Racioppi's Scheme

The government claimed that petitioner was defrauding the United States by signing corporate income tax returns that overstated deductions and personal income tax returns that did not include the check proceeds as part of adjusted gross income. However, petitioner testified that Racioppi had told him that the monies from the checks were to be used to finance his and petitioner's second development and that these monies were loans. Petitioner saved every bit of his share of the proceeds waiting until it was time to begin the new apartments. Because of Racioppi's assurances that he had done this sort of thing before, petitioner believed that the practice was a legitimate one.

Petitioner prepared neither the corporate returns nor his personal returns. Certified public accountant Gerald Goldberg,

a partner in the accounting firm of Wiss and Company, with a totally free hand, and with no interference from petitioner, examined all the Rutherford Corporation books and was responsible for the preparation of all corporate returns as well as petitioner's personal returns.

The Indictment and Trial

On June 11, 1975 a 23-count indictment was filed in the United States District Court for the District of New Jersey charging petitioner with one count of conspiracy and 22 counts of knowingly making and subscribing untrue corporate and personal income tax returns in violation of 26 U.S.C. §7206(1). Frank Racioppi and Michael Sadin were designated therein as unindicted co-conspirators. Petitioner was arraigned in Newark before the Honorable Frederick Lacey. Upon petitioner's motion for recusal of Judge Lacey, the case was transferred to Trenton, New Jersey. Petitioner testified in his own defense that he had no way of knowing he was doing wrong and that he was relying on the professional advice of both Frank Racioppi and the certified public accountant.

Petitioner was convicted on December 17, 1975 when the jury found him guilty of 22 counts; a mistrial was ordered as to the conspiracy count. On April 8, 1976 petitioner was sentenced to eighteen months' imprisonment and fined $10,000. The United States Court of Appeals for the Third Circuit affirmed his conviction on January 18, 1977.

REASONS FOR GRANTING THE WRIT

I.

Errors of due process proportion were committed by the trial court in its refusal to turn over to the defense, in accordance with *Brady v. Maryland*, 373 U.S. 83 (1963), the affidavit of an unindicted co-conspirator which was believed to be favorable to the accused; and

Its refusal to grant petitioner's application under *Giglio v. United States*, 405 U.S. 150 (1972), to interview government agents who spoke to the chief prosecution witness upon his denial under oath of certain things that had transpired in the witness' meetings with the government.

At the very threshold of this case we are met with a question of constitutional dimension involving both the government's refusal to disclose to the defense the affidavit of Michael Sadin and the court's refusal to permit defense counsel to interview and/or take the deposition of any government agent who spoke to chief government witness Frank Racioppi, upon his denial on the witness stand of certain things that transpired during his interview with the United States Attorney's office. The affidavit of Michael Sadin and statements by a member of the United States Attorney's office as to what occurred during the numerous meetings with Frank Racioppi could have been utilized by defense counsel to raise a reasonable doubt in a juror's mind about the petitioner's guilt.

The affidavit of Michael Sadin was sought by defense counsel pursuant to *Brady v. Maryland*, 373 U.S. 83 (1963), while a disclosure of what transpired between the United States Attorney's office and Frank Racioppi was authorized by *Giglio v. United States*, 405 U.S. 150 (1972).

In 1963 this Court decided *Brady v. Maryland, supra*, a constitutionally triumphant decision, holding that the sup-

pression by the prosecution of evidence favorable to an accused upon request violates due process when the evidence is material either to guilt or punishment. This Court has continued to evidence concern about this problem that persists to plague criminal prosecutions. The goal is to hold prosecutors to their duty to conduct themselves as seekers of justice, rather than as advocates privileged to win their cases by any means available. The Court has demonstrated its acceptance of this task by the granting of certiorari in the case of *Weatherford v. Bursey*, 528 F.2d 483 (4th Cir. 1975), *cert. granted*, 19 Crim. L. Rptr. 4085 (U.S. June 21, 1976); in *Weatherford* this Court has shown itself disposed to continue to examine the *Brady* issue.

Defense counsel requested any and all statements made by Michael Sadin, who was named as an unindicted co-conspirator, and who possessed a twenty-five percent interest in the Rutherford Management Company, be turned over to the defense. The Assistant United States Attorney stated to the court that his office was in possession of an affidavit signed by Mr. Sadin; however, he determined that it was not exculpatory and therefore he would oppose giving it to defense counsel. The court determined that the United States Attorney's office should submit the Sadin affidavit to the court for its finding. If the court found that it was *Brady* material, it would turn the affidavit over to defense counsel, otherwise it would simply seal it (393).* Upon examination of the affidavit, the court stated that it did not regard the affidavit as *Brady* material and found that the defense was not entitled to it. Defense counsel objected to the court's ruling.

It was imperative that defense counsel be permitted to see the affidavit of Michael Sadin in order to be able to make the critical decision of whether Sadin was to be called to testify on behalf of petitioner. This crucial determination is for defense counsel

*Refers to pages of appendix filed in United States Court of Appeals for the Third Circuit.

alone to make. Neither the judgment of the government nor even that of the court can be permitted to supplant that of petitioner's advocate. Even if there was not much evidence in the affidavit that may be deemed favorable, Sadin's statement was of vital importance for the fact that it might have contained nothing inculpatory. Omissions of inculpatory evidence are just as *favorable* to an accused. Petitioner's due process rights demand that his attorney be able to make the maximum use of such lack of evidence.

Here, every requirement of the *Brady* rule was met by petitioner. We are confident that the Court will find that Michael Sadin's statement to the United States Attorney would have been, at the very least, helpful to the defense, and at the most, exculpatory.

In the instant case, counsel persisted in his demand for all the *Brady* material within the government files far in advance of trial and during the course of litigation. Surely petitioner came well within the reach of cases requiring disclosure of requested evidence favorable to the defense — not to mention those compelling decisions where there was no request. *Miller v. Pate*, 386 U.S. 1 (1967); *Napue v. Illinois*, 360 U.S. 264 (1959).

We implore this Court to grant the petition in order to halt the practice of trial and appellate courts of becoming trial strategists. The task of deciding the usefulness of any particular piece of evidence, as pointed out so well by this Court in *Jencks v. United States*, 353 U.S. 657 (1957), should be left to the single-mindedness of defense counsel. Surely he is in a much better position to decide how this concealed evidence would be helpful to him. Despite the recent case of *United States v. Agurs*, U.S. , 96 S.Ct. 2392 (1976), which held *inter alia* that a prosecutor does not violate the constitutional duty of disclosure unless his omission is sufficiently significant to result in the denial of the defendant's right to a fair trial, a further problem remains: when defense counsel is refused participation by the

nondisclosure of evidence, he is faced with the dilemma of not being able to demonstrate to *any* court that the evidence would have been helpful.

A reasonable doubt can be created in a juror's mind by the smallest piece of evidence of a single word. Surely the word of Michael Sadin, one who was intimately involved with both the petitioner and the chief government witness, may well have provided that doubt, particularly when Robert Helstoski stood alone against the testimony of Frank Racioppi.

A similar constitutional question was raised when defense counsel established that there had been numerous meetings between Racioppi and members of the United States Attorney's office. Defense counsel quizzed Racioppi about these meetings and inquired as to conversations concerning the witness' possible immunity. On at least four separate occasions, Racioppi gave answers which amounted to a denial (628-30, 632).

In *Giglio v. United States, supra*, this court held that if the assistant United States Attorney, who first dealt with the key government witness, promised the witness that he would not be prosecuted if he cooperated with the government, such a promise is attributable to the government, and nondisclosure of the promise constituted a violation of due process requiring a new trial. *Giglio* expanded the frontiers of *Brady* by bringing within its territorial limits the principle that the state cannot stand by and allow false testimony to go uncorrected, even though unsolicited, and cannot escape the responsibility of the actions of one attorney in the United States Attorney's office, even though disavowed by another.

After hearing the government witness Frank Racioppi make denials with respect to possible things that transpired during his meeting with members of the United States Attorney's office, defense counsel made an application pursuant to *Giglio, supra*, for a representation from the United States Attorney's office as

to what exactly took place in the meetings with Frank Racioppi. In complete defiance of *Giglio*, the prosecutor declined to make any disclosures. The court denied defense counsel's application.

Whether or not there had been any promises made by the government to Frank Racioppi was critical to the witness' credibility. The jurors could not begin to assess the witness' testimony in the absence of all information as to what had transpired between Racioppi and the United States Attorney.

It is beyond argument that Frank Racioppi was the sole witness upon whose testimony the jury convicted Robert Helstoski. Notwithstanding the fact that the witness was granted immunity in the jury's presence, it was error to refuse defense counsel an opportunity to examine all statements that came out of interviews between Racioppi and the United States Attorney. This is the only way in which defense counsel could garner the requisite impeachment matter to strike down Racioppi's credibility in the eyes of the jury.

For all the foregoing reasons the petition for certiorari must be granted.

II.

Petitioner's sixth amendment right to a fair and impartial trial was violated by requiring him to be tried in the Trenton division of the District of New Jersey.

The indictment charging petitioner with violating 18 U.S.C. §371 and 26 U.S.C. §7206(1) was returned by the grand jury in and for the District of New Jersey sitting in Newark. Petitioner was arraigned in Newark before the Honorable Frederick Lacey. The hearing on petitioner's omnibus motion was also held before Judge Lacey in Newark. Chief Judge Whipple reassigned the case to Judge Barlow in Trenton. That is how Robert Helstoski, a resident of the Newark suburb of East Rutherford, whose business is also located in that northern New Jersey community, came to be tried in Trenton, some 70 miles away.

Defense counsel applied for a change of location of the trial — from Trenton to Newark — which was denied. The trial court did not properly consider all relevant factors, otherwise the trial would have properly been transferred back to Newark. This error resulted in the denial to the petitioner of a fair and impartial trial guaranteed by the sixth amendment.

Robert Helstoski resides in East Rutherford, New Jersey, a suburb of Newark. As a result of the transfer of the trial to Trenton, petitioner and defense counsel were sorely inconvenienced because instead of being able to enjoy the advantages of commuting, they were forced to live out of a Trenton motel for the duration of the trial. The government's chief witness, Frank Racioppi, is a resident of Springfield, New Jersey. Springfield is only eight miles from Newark, but it is a distance of 41 miles from Trenton.

Rule 18 of the Federal Rules of Criminal Procedure gives no consideration to the government's convenience because that factor is wholly irrelevant in determining where a defendant

shall receive a fair and impartial trial. *United States v. Gurney*, 393 F.Supp. 688 (M.D. Fla. 1974). Nor does Rule 18 limit the court's examination by prescribing that it shall give "due regard" to the convenience of defense witnesses only. Clearly, the convenience of *both* government and defense witnesses is the test. Therefore, the fact that the primary government witness, unindicted co-conspirator Frank Racioppi, resides a mere eight miles from Newark, combined with petitioner's Newark home, is determinative. Newark was the one and only proper locus of the instant trial.

Dupoint v. United States, 388 F.2d 39 (5th Cir. 1967), was a prosecution for the possession of an unregistered distillery. The court there had occasion to discuss the effect of Rule 18. It found that reversible error was committed by depriving the defendant of a trial in "the division in which the alleged offense occurred, where he had been arraigned, and where he most certainly would have been tried had the government been in position to prosecute at the place" (388 F.2d at 45). As noted, petitioner Robert Helstoski was arraigned in Newark and had there been no necessity to apply for recusal of Judge Lacey, he would surely have been tried in Newark.*

The meaning of Rule 18 is clear on its face; however, the *Dupoint* court added the following illuminating remarks:

> "That a defendant should be tried in the division in which the offense was committed, *especially when he resides there*, is not lightly to be evaded. The real effect of Rule 18 is that it is not to be done except with due regard for the defendant's convenience *and* that of the witnesses. The convenience of the Government is not a factor. As evidenced by the Constitutional requirement that none shall be prosecuted outside the district in which the offense is committed, it is the public policy of

*The motion for recusal was based upon Judge Lacey's presiding over a bitterly contested hearing involving Congressman Henry Helstoski, petitioner's brother.

this country that one must not arbitrarily be sent, without his consent, into a strange locality to defend himself against the powerful prosecutorial resources of the Government" (388 F.2d at 44; first emphasis supplied).

This Court should grant the petition for writ of certiorari to examine whether the residents of that area — Newark — which has the closest connection to the crime were foreclosed from participating in their shared responsibility for the enforcement of the criminal laws.

III.

The trial court's grievous error in permitting the government to call an unindicted co-conspirator as a witness to extract from him a claim of self-incrimination denied petitioner due process of law.

The question which dominates this petition involves the trial court's sanctioning a most suspect procedure. The stage for the fifth amendment drama was set by the calling of the government's premier witness, Frank Racioppi, the secretary of the Rutherford Corporations. Racioppi is named at least eight times in the indictment as an "unindicted co-conspirator." In response to the Assistant United States Attorney's first question, the witness responded: "Sir, I refuse to answer that question on the grounds that it's self-incriminating" (263). Counsel, stunned by this surprising action on the part of the government and recognizing the severe prejudice inherent in the situation, moved unsuccessfully for a mistrial. At the government's request, Racioppi was then granted immunity by the court.

Defense counsel established on cross-examination that the government's well planned effort to have petitioner's alleged partner in crime declare to the jury that he personally had concluded that his activities violated the law, thus giving rise to the inference that petitioner's activities were unlawful as well,

had been staged and rehearsed during numerous meetings between the witness, his attorney, and members of the United States Attorney's office.

Although the court did instruct the jury as to immunity, there was nothing in the charge about the incident whereby the chief government witness claimed the fifth amendment before the jury. Neither at the time of the witness' claim nor during the charge did the court instruct or direct the jury to disregard the incident or not to consider it to the prejudice of petitioner.

In the instant case the presence of a combination of factors clearly shows that there was committed prejudicial error when the prosecutor called Racioppi as a witness for the purpose of extracting from him a claim of privilege against self-incrimination. First, Racioppi's close involvement in petitioner's alleged criminal activities was established by the fact that he was named in the indictment as an unindicted co-conspirator as well as testimony that he suggested the cash-checking scheme. This first requirement of prejudice was clearly satisfied when Racioppi asserted his privilege against self-incrimination in response to the government's question of whether there came a time when he "cashed checks of Rutherford Heights, Rutherford Park and Rutherford East and shared those proceeds with the defendant, Robert J. Helstoski?" (263).

Second, the testimony of Racioppi on cross-examination shows that the Assistant United States Attorney knew that the witness would claim his privilege, thus establishing the government's bad faith. Indeed, the government made this representation to the court under oath as part of its application for immunity. Had this not been the situation, there would have been no arrangements made to grant Racioppi immunity.

Third, when the first question was put to him, Racioppi had not been granted immunity and therefore clearly had a right to invoke his privilege. As further evidence of the inherent

prejudice in the government's calling a witness knowing that he will claim his fifth amendment privilege is the fact that defense counsel made timely objection by moving for a mistrial and by requesting a standing objection. The absence of any action by way of charge on the part of the court exacerbated the error.

In *Grunewald v. United States*, 353 U.S. 391 (1957), this Court recognized that:

> "[T]he danger that the jury made impermissible use of the testimony by implicitly equating the plea of the Fifth Amendment with guilt is, in light of contemporary history, far from negligible" (353 U.S. at 424).

To have expected the jury to ignore the inference of complicity when Racioppi invoked his privilege to that first question of whether he had cashed the checks of the Rutherford Corporations and shared the proceeds with petitioner was wholly unrealistic.

Furthermore, by instructing the jury that Racioppi, as an immunized witness, could "still be prosecuted for the crime of perjury", the court effectively seared into the jurors' minds the witness' veracity. Since Racioppi had taken the fifth amendment to avoid possible implication in any crime, the likelihood was extremely slim that he would risk being prosecuted for perjury by not telling the truth. It was error for the court to bolster the oath in such an impermissible fashion. The instruction was the final link in the chain of events that began with Racioppi's invoking the fifth amendment and ended with petitioner's being convicted on the testimony of one witness.

Courts of Appeals have recognized as "well established" the rule that the government may not call a witness knowing that the witness will refuse to testify. *Cf. United States v. Roberts*, 503 F.2d 598 (9th Cir. 1974), *cert. denied*, 419 U.S. 1113 (1975); *United States v. Coppola*, 479 F.2d 1153 (10th Cir. 1973); *San Fratello v. United States*, 340 F.2d 560 (5th Cir. 1965); *United States v. Tucker*, 267 F.2d 212 (3d Cir. 1959).

In this close case, petitioner's fate was sealed when the government achieved the best of both worlds by deriving the benefit of the prejudicial inference of complicity on the part of petitioner plus the witness' testimony against the petitioner. At that moment the petitioner's conviction was ordained and this case was destined to reach this Court. The instant problem is one which is reaching epidemic proportions. The United States Court of Appeals for the Fifth Circuit is now considering the identical issue in *United States v. Ritz*, Docket No. 76-1715. In light of the Fifth Circuit's 1965 decision in *San Fratello v. United States, supra*, there exists a very good likelihood that that court will reverse the conviction on the sole ground that calling a witness for the purpose of extracting from him a claim of self-incrimination is prejudicial error, requiring a reversal and a new trial. Recently, this Court has shown itself inclined to grant certiorari in cases concerning various aspects of the fifth amendment. *E.g., Doyle v. Ohio,* U.S. , 96 S.Ct. 2240 (1976); *United States v. Mandujano,* U.S. , 96 S.Ct. 1768 (1976); *Beckwith v. United States,* U.S. , 96 S.Ct. 1612 (1976); *Garner v. United States,* U.S. , 96 S.Ct. 1178 (1976). Under these circumstances of a conflict between the circuits and recent developments, this Court should grant petitioner's writ of certiorari.

CONCLUSION

For all these reasons, the writ of certiorari should be granted.

February, 1977

Respectfully submitted,

Herald Price Fahringer, Esq.
Attorney for Petitioner
One Niagara Square
Buffalo, New York 14202
(716) 849-1333

Lipsitz, Green, Fahringer,
Roll, Schuller & James
of Counsel.

APPENDIX

APPENDIX A

Judgment Order of the United States Court of Appeals for the Third Circuit

UNITED STATES COURT OF APPEALS FOR THE THIRD CIRCUIT

NO. 76-1453

UNITED STATES OF AMERICA

v.

ROBERT J. HELSTOSKI, Appellant

APPEAL FROM THE UNITED STATES DISTRICT COURT FOR THE DISTRICT OF NEW JERSEY
(*D. C. Criminal No. 75-265*)
January 14, 1977
Submitted Under Third Circuit 12(6)
Before GIBBONS and GARTH, *Circuit Judges*, and BECHTLE,* *District Judge*

---

*Louis C. Bechtle, United States District Judge for the Eastern District of Pennsylvania, sitting by designation.

Jonathan L. Goldstein,
United States Attorney
John J. Barry,
Assistant United States Attorney
Robert Beller,
Assistant United States Attorney
Federal Building
970 Broad Street
Newark, New Jersey 07101
Attorneys for Appellee*

Herald Price Fahringer, Esquire
Lipsitz, Green, Fahringer,
Roll, Schuler & James
One Niagara Square
Buffalo, New York 14202
Attorney for Appellant

JUDGMENT ORDER

In this appeal from a judgment of sentence following a verdict finding defendant guilty of income tax fraud, 26 U.S.C. §7206(1) the appellant contends

(1) that the court erred in refusing a mistrial because the government as a predicate for the grant of immunity caused a witness to plead the privilege against self incrimination before the jury,

*The brief of the United States was not timely filed and no motion for an extension of time was presented to the court. Thus the brief of the United States was not filed or considered.

(2) that the evidence was insufficient to establish tax fraud because of

(a) defendant's good faith reliance on a qualified expert,

(b) lack of evidence of bad faith,

(3) that the court misinstructed the jury

(a) on the defense of reliance on professional advice, and

(b) on the co-conspirator status of Frank Racioppi and Michael Sadin,

(4) that the court withheld an affidavit of Michael Sadin which under *Brady v. Maryland*, 373 U.S. 83 (1963) should have been produced, and in withholding material which under *Giglio v. United States*, 405 U.S. 150 (1972) should have been produced,

(5) that the court erred in holding the trial in the Trenton division of the District of New Jersey,

(6) that the court erred in refusing to permit counsel to examine a juror in a post-verdict examination.

We find no error.

It is therefore Ordered and Adjudged that the judgment of the district court is affirmed.

By the Court,
/s/ JOHN GIBBONS
Circuit Judge

Attest
/s/ THOMAS F. QUINN
Thomas F. Quinn
Clerk

Dated: January 18, 1977